

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 153

Docket No. DA-0752-08-0126-M-1

**Patrick W. Dooley,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

August 6, 2009

Patrick W. Dooley, Baton Rouge, Louisiana, pro se.

Phia L. Williams, New Orleans, Louisiana, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This appeal is before the Board on remand from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which vacated and remanded the Board's decision that dismissed the appellant's claim that the agency violated his First Amendment rights on the basis of res judicata. In accordance with the court's decision, we DISMISS this appeal for lack of jurisdiction.

BACKGROUND

¶2 The background, as set forth by the Federal Circuit in *Dooley v. Department of Veterans Affairs*, 306 F. App'x 594, 595 (Fed. Cir. 2009), is as follows: Beginning in February 1991, the appellant worked for the agency under

a temporary appointment as a cemetery caretaker for the Port Hudson National Cemetery near Baton Rouge, Louisiana. In 1992, the agency terminated the appellant's appointment due to lack of funds. The appellant filed an individual right of action (IRA) appeal with the Board in 1995 under the Whistleblower Protection Act, [5 U.S.C. § 2302](#)(b)(8), alleging that he was terminated in reprisal for protected whistleblowing activity. The Board rejected the appellant's whistleblowing claim on the merits, and the Federal Circuit affirmed. *See Dooley v. Department of Veterans Affairs*, MSPB Docket No. DA-1221-95-0795-W-1 (Initial Decision, Apr. 3, 1996); *Dooley v. Department of Veterans Affairs*, [71 M.S.P.R. 102](#) (Table), *aff'd*, [101 F.3d 717](#) (Fed. Cir. 1996) (Table). The appellant filed a second IRA action in 1997, which the Board dismissed under the doctrine of res judicata. *See Dooley v. Department of Veterans Affairs*, MSPB Docket No. DA-1221-97-0394-W-1 (Initial Decision, July 31, 1997). The appellant then brought an action in the United States District Court for the Middle District of Louisiana, alleging that his termination violated his rights under the First Amendment. The district court dismissed the appellant's complaint for lack of subject matter jurisdiction, reasoning that the claim was barred by the Civil Service Reform Act, [5 U.S.C. § 1101](#) et seq. *Dooley v. Principi*, No. 3:03-CV-00672 (M.D. La. Oct. 18, 2005). The Fifth Circuit affirmed. *Dooley v. Principi*, 250 F. App'x 114 (5th Cir. 2007).

¶3 The appellant then filed the present claim - his third appeal to the Board - alleging that his termination violated his First Amendment rights. An administrative judge (AJ) reviewed the record and found no new issues were raised by the appellant that were not included, or that could not have been included, in his prior appeals to the Board. *Dooley*, 306 F. App'x at 595. The AJ therefore concluded that the doctrine of res judicata precluded litigation of the appellant's First Amendment claims. *Id.* The AJ dismissed the case on the ground of res judicata, and the Board denied review. *Id.*

¶4 The appellant appealed to the Federal Circuit, alleging that his termination violated his First Amendment rights and requesting review of the Board’s dismissal of his appeal based on res judicata. The court found that, under the Whistleblower Protection Act, the Board lacks jurisdiction over First Amendment claims brought in the context of an IRA appeal. *Dooley*, 306 F. App’x at 595. Thus, the court held that the Board erred when it determined that the appellant could have included his First Amendment claim in his prior appeals. *Id.* The court found further that, because the appellant was appointed to a temporary position, he was not an “employee” for purposes of [5 U.S.C. § 7701\(a\)](#), and as a result, the Board lacks jurisdiction to hear any appeal concerning the appellant’s termination, other than an IRA whistleblower claim. *Id.* at 596. Therefore, the court held that the Board lacked jurisdiction to render any decision on the appellant’s First Amendment claim, including a decision dismissing that claim on the basis of res judicata. Accordingly, the court vacated the Board’s decision and remanded the appeal for the Board to dismiss this case for lack of jurisdiction, based on the determination that the appellant is not an “employee” with Board appeal rights. *Id.*

ANALYSIS

¶5 We interpret the court’s remand decision as stating that, in order to assert a First Amendment claim, the appellant first must have the type of appeal covered by [5 U.S.C. § 7701](#). However, that statute does not confer jurisdiction upon the Board; rather, it sets forth procedures for adjudicating appeals within the Board’s jurisdiction. *Belhumeur v. Department of Transportation*, [104 M.S.P.R. 408](#), ¶ 9, *appeal dismissed*, 224 F. App’x 967 (Fed. Cir. 2007).

¶6 The Board’s jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). While the Board is empowered by statute to hear appeals of removals from the federal service,

[5 U.S.C. §§ 7512](#)(1), 7513(d), 7701(a), the right to appeal an action to the Board is generally limited to persons who meet the definition of “employee” set forth in [5 U.S.C. § 7511](#)(a)(1). Under the provision relevant here, the term “employee” means:

(A) an individual in the competitive service –

- i) who is not serving a probationary or trial period under an initial appointment; or
- ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less [.]

[5 U.S.C. § 7511](#)(a)(1).

¶7 In *McCormick v. Department of the Air Force*, [307 F.3d 1339](#) (Fed. Cir. 2002), *pet. for reh’g en banc denied*, [329 F.3d 1354](#) (Fed. Cir. 2003), the court emphasized that, in [5 U.S.C. § 7511](#), subsections (A)(i) and (A)(ii) are separated by the word “or,” and that those sections should be read as providing “alternative definitions” of “employee.” *McCormick*, 307 F.3d at 1342-43. However, since *McCormick*, the Board has specifically considered the question of whether an employee serving in a temporary position limited to 1 year or less can qualify as an “employee” under [5 U.S.C. § 7511](#)(a)(1)(A)(i). See *Tschumy v. Department of Defense*, [104 M.S.P.R. 488](#), ¶¶ 8-16 (2007); *Johnson v. Department of Veterans Affairs*, [99 M.S.P.R. 362](#), ¶¶ 5-10, *review dismissed*, 161 F. App’x 945 (Fed. Cir. 2005). The Board found that, although the court’s decision in *McCormick* could be read to hold broadly that anyone who meets the literal terms of either subsection (A)(i) or subsection (A)(ii) has adverse action appeal rights, the Board would not apply such a broad holding where temporary employees are involved. *Johnson*, [99 M.S.P.R. 362](#), ¶¶ 5-8. The Board found that, to apply *McCormick* broadly in such cases would produce an unreasonable result, i.e., every temporary appointee would have appeal rights from the appointee’s very first day of work – a result that it had no reason to believe Congress intended. *Tschumy*, [104 M.S.P.R. 488](#), ¶ 15; *Johnson*, [99 M.S.P.R. 362](#), ¶¶ 9-10. Thus, the Board

explicitly held that the appeal rights of an individual serving under an appointment that does not require completion of a probationary or trial period are governed exclusively by subsection (A)(ii). *Johnson*, [99 M.S.P.R. 362](#), ¶ 7. Therefore, a temporary appointee is an “employee” with appeal rights under [5 U.S.C. § 7511](#)(a)(1) *only* if at the time of the action he or she had 1 year of current continuous service under an appointment other than one limited to 1 year or less. *Tschumy*, [104 M.S.P.R. 488](#), ¶ 15; *Johnson*, 99 M.S.P.R. 362, ¶ 7.

¶8 Here, it is undisputed that, at the time the agency terminated the appellant’s employment due to lack of funds, the appellant was employed in the competitive service under a temporary appointment limited to 1 year or less. *Dooley*, MSPB Docket No. DA-1221-97-0394-W-1, IAF, Tab 1 at 2, 14-15. It is also undisputed that the appellant’s service from February 1991 to March 1992 was performed under multiple temporary appointments limited to less than 1 year. *Id.* at 10, 14-15. Because the appellant was a temporary appointee whose service, although greater than 1 year, was under temporary appointments limited to 1 year or less, he was not an “employee” within the meaning of [5 U.S.C. § 7511](#)(a)(1). Therefore, the Board lacks jurisdiction over the appeal.

¶9 Accordingly, because the Board has no jurisdiction over this appeal, we DISMISS it for lack of jurisdiction.

ORDER

¶10 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.